

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in June 2012

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	ABUSE OF AUTHORITY OR DISCRETION; SPECIAL NEEDS STUDENTS; RESA
<u>CASE STYLE:</u>	<u>SHAMBURG v. BERKELEY COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2011-0232-BERED (6/27/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent abused its discretion in acting to protect the safety and health of the students involved in this grievance.
<u>SUMMARY:</u>	Grievant argues that Respondent chose to utilize a Regional Education Services Agency ("RESA") to transport two autistic students in order to get around the posting requirement and filling of a service personnel position on the basis of the seniority requirement of W. VA. CODE § 18A-4-8b and § 18-5-39. The record established that the special needs of the students were taken into account when making the decision to contract with RESA VIII for transportation services. The West Virginia Supreme Court has ruled that boards of education are permitted wide discretion in making personnel decisions that impact the health and safety of students. In addition, Respondent took no action and made no decision regarding the selection of the bus operator to continue transporting the students in question. Therefore, Grievant is challenging a decision which was not made by his employer. Grievant did not establish by a preponderance of the evidence that Respondent abused its authority or discretion in this case. Accordingly, this grievance is DENIED.

<u>KEYWORDS:</u>	INSUBORDINATION; PRE-TRIP INSPECTION; VIDEOTAPE; REPRISAL; HARASSMENT; DISCRIMINATION AND FAVORITISM; IMPROPER SUPERVISORY BEHAVIOR;
<u>CASE STYLE:</u>	<u>TIBBS v. HANCOCK COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2012-0102-HANED (6/21/2012)
<u>PRIMARY ISSUES:</u>	Whether or not Respondent proved that Grievant willfully disobeyed an order or directive given by her supervisor.
<u>SUMMARY:</u>	Grievant, a bus operator, was suspended for three days without pay for insubordination, when her supervisor observed her, and did not see her perform a pre-trip inspection of her bus after being told by him to be careful to check the oil when she did her pre-trip inspection. Respondent did not demonstrate that this charge, if proven, would amount to the wilful failure to obey an order necessary to prove a charge of insubordination. Accordingly, this grievance is GRANTED.

KEYWORDS: POSTING; FAVORITISM, UNTIMELY; ARBITRARY; CAPRICIOUS; RECONFIGURED; MINOR MODIFICATIONS; MERGED ROUTES; INCONSISTENT

CASE STYLE: COTTRILL v. BRAXTON COUNTY BOARD OF EDUCATION

DOCKET NO. 2011-1495-BRAED (6/12/2012)

PRIMARY ISSUES: Whether Respondent's decision to eliminate Grievant's route assignment and, subsequently, make minor modifications to the bus routes of other bus operators was lawful and/or an abuse of discretion.

SUMMARY: Grievant, a regular bus operator contends Respondent's actions related to merged and reconfigured county bus routes of school year 2011-2012 and the assignment thereof to bus operators, were inconsistent and improper. Respondent's actions could and perhaps should have been less convoluted. However, it is not established that Respondent's actions exceeded its discretionary authority as it relates to the issue(s) in discussion. Respondent's actions were ultimately consistent with the articulated plan for reconfigured/modified bus routes. Grievant filed this grievance aware of his particular status, but not fully aware of the criteria used to determine route assignments. It is not established that Respondent's action(s) were illegal. Further, Grievant did not prove his claims of favoritism and/or discrimination. Grievance DENIED.

<u>KEYWORDS:</u>	ROUTES ASSIGNMENTS; DISCRETIONARY AUTHORITY; DISCRIMINATION; FAVORITISM; RECONFIGURED ROUTES
<u>CASE STYLE:</u>	<u>ROSE v. BRAXTON COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2011-1442-BRAED (6/12/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent's actions in not awarding Grievant a newly formulated, merged county bus route which was substantially similar to the assignment Grievant had been performing during the prior school year was lawful.
<u>SUMMARY:</u>	<p>Respondent implemented a coherent process for assignment of bus operators to reconfigured/modified routes. Grievant contends violation of W. VA. CODE § 18A-2-7 and discrimination/favoritism per W. VA. CODE § 6C-2-2. The merged bus route assignment of discussion for the 2011-2012 school year is substantially the same as the run driven by Grievant the prior year but assigned to another bus operator, a more senior driver than Grievant. Respondent's decision to eliminate the assignment of Grievant, making modifications to the overlapping run of a more senior bus operator, was neither arbitrary nor capricious. Some of Respondent's actions could and perhaps should have been more prudently implemented; however, Respondent's ultimate actions are consistent with the articulated plan for reconfigured/modified bus routes. The implemented plan of action has not been shown to be an unreasonable exercise of Respondent's recognized discretionary authority. In the final analysis, it is not established that Respondent's paramount action(s) were unlawful; nor did Grievant prove his allegations of favoritism and/or discrimination. Grievance DENIED.</p>

<u>KEYWORDS:</u>	TERMINATION; WILLFUL NEGLECT; INSUBORDINATION; DISPARATE TREATMENT; SPECIAL NEEDS STUDENTS; SPECIAL EDUCATION BUS; SECURING WHEELCHAIRS
<u>CASE STYLE:</u>	<u>VAUGHN v. BROOKE COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2012-0121-BROED (6/6/2012)
<u>PRIMARY ISSUES:</u>	Whether or not Respondent proved that Grievant's conduct constituted insubordination and willful neglect of duty.
<u>SUMMARY:</u>	Grievant was terminated from her employment as an Aide after several incidents involving students which occurred on the special education bus to which she was assigned, and which placed the students at risk. The last incident occurred in the afternoon of the same day she met with her supervisors and was clearly told she was to double check to make sure the straps on the wheelchairs on the bus had been properly secured by the bus operator. Instead of following this directive, Grievant sat down on the front seat and began telling the bus operator about the meeting that morning, and a wheelchair tipped over with the student in it when the bus began moving. Respondent proved the charges of insubordination and willful neglect of duty. Grievant's claim of disparate treatment was not proven as the bus operator's responsibilities and actions were not similar to hers. Accordingly, this grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	DISCIPLINE, DISMISSAL, SICK LEAVE, ANNUAL LEAVE.
<u>CASE STYLE:</u>	<u>SCARBRO v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES</u> DOCKET NO. 2012-0440-DHHR (6/18/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant was properly dismissed for excessive use of leave.
<u>SUMMARY:</u>	Grievant was dismissed from employment after a long history of absenteeism. Grievant argues that she had medical issues that caused her absences. She also argues that she was penalized for missing work due to her service in the Army National Guard. Respondent demonstrated that for the nine years that Grievant was employed, she was off for sick leave nearly thirty-five percent of the time and off the payroll because her leave had expired approximately seventeen percent of the time. Grievant's continued absences made it impossible for Respondent to rely upon her to perform her job on a consistent basis. Respondent proved the grounds for Grievant's dismissal by a preponderance of the evidence. DENIED

<u>KEYWORDS:</u>	DISMISSAL ORDER; RES JUDICATA
<u>CASE STYLE:</u>	<u>BAKER v. DIVISION OF HIGHWAYS</u> DOCKET NO. 2011-1393-DOT (6/12/2012)
<u>PRIMARY ISSUES:</u>	Whether the doctrine of res judicata was applicable to preclude the relitigation of the issues.
<u>SUMMARY:</u>	This is the same grievance filed by Grievant in 2009. A level three decision was issued on that grievance by the Grievant Board on January 28, 2011, and Grievant did not appeal that decision. This grievance is barred by the doctrine of res judicata.

KEYWORDS: DISMISSAL ORDER; STANDING; TERMINATION; TEMPORARY EMPLOYEE; PERMANENT EMPLOYEE

CASE STYLE: WAYBRIGHT v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HOPEMONT HOSPITAL
DOCKET NO. 2012-1317-DHHR (6/15/2012)

PRIMARY ISSUES: Whether Grievant, as a temporary employee, had standing to file a grievance.

SUMMARY: Grievant was hired as 720 hour temporary exempt employee. Temporary employees are not afforded the statutory right to file a grievance.

KEYWORDS: SUSPENSION; TERMINATION; LEAVE ABUSE; EXCESSIVE ABSENTEEISM; COUNSELING; PLAN OF IMPROVEMENT

CASE STYLE: MASTERS v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HOPEMONT HOSPITAL
DOCKET NO. 2011-1895-CONS (6/12/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant had a long history of leave abuse, which warranted suspension and termination after progressive disciplinary measures were ineffective.

SUMMARY: Grievant was terminated for a long pattern of leave abuse. Grievant had a history of leave abuse, and had received reprimands and suspensions. Despite numerous attempts at counseling sessions and a plan of improvement, Grievant continued a pattern of leave abuse. Respondent met its burden of proof and demonstrated that Grievant was suspended and terminated for good cause. This grievance is DENIED.

KEYWORDS: TRANSPORTATION; POLICY; TRAINING; CLEARLY WRONG; ABUSE OF DISCRETION; BURDEN OF PROOF

CASE STYLE: GROGG, ET AL. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital AND Division of Personnel
DOCKET NO. 2011-0200-CONS (6/4/2012)

PRIMARY ISSUES: Whether or not Grievants established by a preponderance of the evidence that Respondent's transportation policy or training requirements were clearly wrong or the result of an abuse of discretion.

SUMMARY: Grievants are employed as drivers at the William R. Sharpe, Jr. Hospital. They challenge Respondent's transportation policy that a driver can be counted as the second staff member when transporting forensic patients. They also challenge Respondent's requirement that they participate in yearly training. Grievants did not establish by a preponderance of the evidence that Respondent's transportation policy was clearly wrong or the result of an abuse of discretion. In addition, Grievants have not demonstrated by a preponderance of the evidence that Respondent's training requirements were clearly wrong or constituted an abuse of discretion. Accordingly, this grievance is DENIED.

<u>KEYWORDS:</u>	UNAUTHORIZED LEAVE; WRITTEN REPRIMAND, ORAL WARNING, HOSTILE WORK ENVIRONMENT; EXCESSIVE; ABUSE OF DISCRETION
<u>CASE STYLE:</u>	<u>PYATT v. DIVISION OF HIGHWAYS</u> DOCKET NO. 2011-0618-DOT (6/13/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that Grievant took unauthorized leave, whether Grievant proved that Respondent's issuance of a written reprimand was excessive and an abuse of discretion, and whether Grievant proved that Respondent subjected him to a hostile work environment.
<u>SUMMARY:</u>	Grievant missed a day of work because of his child's illness. However, Grievant did not have enough accrued leave to cover his entire absence. After exhausting his leave to cover some of this absence, Grievant had to go off payroll for five hours. Respondent issued Grievant a written reprimand for unauthorized leave. At Level One, the written reprimand was mitigated to an oral warning. Grievant asserts that he did not take unauthorized leave and that Respondent has subjected him to a hostile work environment. Respondent argues that Grievant was on unauthorized leave for which he can be disciplined and denies Grievant's hostile work environment allegations. Respondent met its burden of proving that Grievant was on unauthorized leave. Grievant failed to meet his burden of proving that the oral warning he received was excessive, or an abuse of discretion. Further, Grievant failed to produce sufficient evidence to prove his hostile work environment claim. Therefore, this grievance is DENIED.
<u>KEYWORDS:</u>	UNTIMELY; SELECTION; RETALIATION; ARBITRARY AND CAPRICIOUS
<u>CASE STYLE:</u>	<u>SHILLINGBURG v. WORKFORCE WEST VIRGINIA AND DIVISION OF PERSONNEL</u> DOCKET NO. 2011-0936-CONS (6/26/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievance was timely filed and whether Grievant demonstrated she should have been selected for the position at issue.
<u>SUMMARY:</u>	Grievant believes she should have been temporarily upgraded rather than another employee who had less seniority and experience than she, and that she should have been selected for a posted position. Respondent demonstrated that the first grievance was not timely filed. As to the selection grievance, Grievant did not demonstrate a flaw in the selection process, or that she was the best candidate for the position. Accordingly, this grievance is DENIED.